IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

JOHN J. MUTH,

Petitioner-Appellant below,

vs.

AETNA OIL CO., JOHNSTON DRILLING CO., INC., FRED J. KECK, IDA F. KECK, ARTHUR OETH, ROBERT OETH, JAMES A. BOLAND, OLLIE HUSK,

Respondents-Appellees below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioner, John J. Muth, hereinafter designated as plaintiff, respectfully prays that a writ of certiorari issue to review and reverse the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on May 8, 1951, and represents as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. On August 7, 1950, the United States District Court for the Southern District of Indiana, Evansville Division, rendered a judgment against the plaintiff in the above cause of action, wherein plaintiff, in a variety of forms (Complaint, R. 3-14, 17-19, 20-40), sought relief against the defendants because of their wrongful conduct in depriving plaintiff of his rights in an oil and gas lease which he and the defendants, Arthur Oeth and Robert Oeth, had obtained from the defendants Fred J. Keck and Ida F. Keck, as landlords, on December 22, 1947, and in which lease the plaintiff, at the time of its execution, acquired a one-half interest, and said Oeths acquired the other one-half interest. The cause was referred to a special master, who, after hearing the evidence, made findings of fact and conclusions of law which, in the main, were approved by the trial court, judgment was rendered against the plaintiff, and from which plaintiff appealed to the United States Court of Appeals for the Seventh Circuit; the court of appeals affirmed on May 8, 1951. (Court of Appeals opinion, R. 519.) No petition for a rehearing was filed in the court of appeals.

2. Jurisdiction is founded on diversity of citizenship and amount in controversy, and the trial court found and concluded that it had jurisdiction of the parties and the subject matter. (Findings 2 and 3, R. 461, 462, Conclusion 1, 474.)

3. On October 6, 1947, the defendants, Arthur Oeth and Robert Oeth, then operating a business under the unincorporated firm name of The Oeth Drilling Company,

as parties of the first part, entered into a partnership agreement with the plaintiff, John J. Muth, as party of the second part, wherein such parties mutually agreed to associate themselves together in securing oil and gas leases, royalties and drilling contracts in territory that the anticipated depth of oil or gas production was suitable for the capacity of a Type, or Model No. 71, Star Drilling Machine, and designated equipment, or other rig, if the partnership should acquire additional rigs, said Star Drilling Machine being equipment then owned by the Oeths, and in said partnership agreement Oeths agreed to sell a one-half interest in said Star Drilling Machine to Muth; "All leases or royalties taken for this partnership shall be written in the names of Arthur Oeth and Robert Oeth, as owners of a one-half interest, and John J. Muth, Sr., as owner of a one-half interest"; each partner that performed labor on the wells or for the company was to receive wages for labor as though he was a disinterested party; Oeths agreed to help secure oil and gas leases or royalties and help run the drilling rig; the drilling rig and equipment was valued at $4,000 and was to remain the property of Oeths until such time as the net profits earned by the rig or the joint efforts of the partnership should equal such agreed value of $4,000, together with any additional tools or equipment that might be purchased from time to time by the partnership; if either party did not wish to sell his interest in leases or property at a price that was offered and the other party did wish to sell, the party who did not wish to sell, agreed to either sell at the price offered or to buy the other parties' interest at the price offered; either party could cancel the agreement by giving a thirty days' written notice to the other, and there should then be an audit made and after all labor and expenses had been paid the net profits should be divided and one-half go to Oeths and one-half to Muth; the agreement and partnership should not apply to any property of either

party other than as above stated, and either party had the right to engage in the same or other lines of business, separate from the partnership, so long as it was not done at the expense of the partnership; Oeths were to handle the funds of the partnership until such time as the property had been fully paid out, then there should be a separate account set up and thereafter all partnership checks against the partnership funds should be signed by either of the Oeths and countersigned by Muth; it was agreed that the partnership should begin as of October 6, 1947, and efforts should be made to secure desirable oil and gas leases and drilling deals in areas that were considered likely for oil or gas production, and an effort made to get the drilling rig running as soon as practical and to try and keep it running at a profit. (Plaintiff's Exhibit B-2, R. 439-441; Finding 6, R. 463.)

4. The partners, acting pursuant to said partnership agreement, obtained eight oil and gas leases in Posey and Vanderburg counties, Indiana, in addition to the lease on the 67.5 acres owned by Keck (sometimes referred to as the joint lease), and entered into commitments to the lessors in certain of said oil and gas leases; the partners bargained for one Jensen drilling rig of capacity to drill twenty-five hundred to twenty-six hundred feet in addition to the Star drilling rig of less capacity owned by the partnership, but said Jensen drilling rig was taken over by defendant Arthur Oeth and not used as contemplated in the said partnership agreement. (Finding 7, R. 463.) The Keck lease was acknowledged before a notary public and recorded in the appropriate recorder's office. (Finding 4, R. 462.) At the time of the execution of said lease it was known to Kecks, the lessors, that the lessees were partners in the business of taking oil and gas leases (Finding 6, R. 463), and the lessees were designated in such lease as "Arthur Oeth and Robert Oeth (owners of one-half interest, and John J. Muth, Sr., one-half interest).

(Partnership lease of December 22, 1947, R. 29-41.) The partnership lease was for the primary term of three years from date and as long thereafter as drilling operations were continued; it granted, demised, leased and let exclusively unto said lessees and assigns, the 67.5 acres of land specifically described therein, with the exclusive right for the purpose, among others, of operating for and producing therefrom oil and gas; it provided for a royalty of $\frac{1}{8}$ to the lessor; it also provided that if the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and provided that

> "This Lease shall terminate in three months and be null and void as to both parties unless the Lessees or their assigns shall commence or cause to be commenced the drilling of a test well and thereafter continue with due diligence to completion." (R. 35.)

5. On January 3, 1948, Arthur Oeth gave a notice in writing to plaintiff Muth of his intention to terminate their partnership on thirty days' notice, but final settlement of partnership affairs was not had until July, 1948. (Finding 8, R. 463.)

6. On March 1, 1948, Muth wrote Arthur Oeth that

> "The time for the commencing of a well on the Keck lease is getting short and I would like it if you and Robert would meet with me the earliest possible date and see if we can work out a peaceful and satisfactory dissolution agreement of our jointly owned business." (Finding 7, R. 463.)

A few days thereafter, and without the knowledge of Muth, Arthur Oeth obtained from Keck, who was his uncle, a "top lease" for gas and oil on the same land covered by the joint lease. This top lease

> "was an exact copy of the lease of December 22, 1947, with the exception that the time (for drilling a test well) was extended thirty or sixty days"

(Finding 12, R. 465), and it was executed and delivered by Kecks to the defendant Arthur Oeth, individually. (R. 189.)

7. The execution of the top lease was without the knowledge of Muth, and was a transaction solely between Fred J. Keck and Arthur Oeth, which took place about ten days before March 22, 1948; Muth was never present when Keck and Oeth dealt with each other concerning such top lease.

Keck testified that after the execution of the Muth-Oeth lease, and before March 22, 1948, Arthur Oeth came back to the Keck home and asked Keck to sign a separate lease to him; that Arthur Oeth then told him he wanted to obtain not only the one lease, he wanted leases on the three farms adjoining Keck on the south. (R. 400.) Oeth told Keck he wanted the top lease from him and if he could get that he thought he could get the neighbor's lease; Oeth said he wanted a lease to himself alone and he said "I believe I could get the neighbor's lease if I could get yours." (R. 97.)

8. Arthur Oeth testified that he and Muth had been to see one of Keck's neighbors on the south, a Miss Mesker, and she refused to sign a lease for them; that he, Oeth, had gone back to her and asked her to sign and she said she would sign a lease for him for the reason of Keck getting a well drilled more than anything else, but she said she would not sign a lease with "that fellow's (Muth) name on it that come over here with you. I don't like his looks." (R. 118.) Oeth said he studied the matter over,—not knowing what to do, and then went and talked with another of Keck's neighbors, a Mr. Klucker; Klucker told him he wouldn't sign a lease unless he could see Miss Mesker's and Keck's lease, too. (R. 118.) The next day Oeth said he took his other boy, one that could typewrite, and a typewriter to Keck's home. (R. 398, 399.) Arthur Oeth then told Keck that Miss Mesker would not sign a

lease for him until she saw Keck's lease, and Oeth "asked Keck if he would stand hitched" and "consent to us copying that lease over to show Miss Mesker your lease?" (R. 118); the Oeth boy then typed from the copy of the Muth-Oeth lease. (R. 118, 398, 399.) Mr. Keck then signed the top lease and delivered it to Arthur Oeth. (R. 119.) The top lease did not contain the name of Mr. M-th, because Miss Mesker "didn't want his name there" (R. 148); it was dated back to December 22, 1947, because Miss Mesker didn't definitely know whether Muth's name was on that lease of Keck's or not, but she suspicioned it; Arthur Oeth dated it back to December 22 to show her Muth had no interest,—so his name wasn't on it, "so I (Arthur Oeth) wanted her to sign the lease." (R. 149.)

Keck knew when he signed that top lease for Arthur Oeth that he was going to show it to Keck's neighbors and he authorized Oeth to show it to his neighbors so he could get their leases for himself. (R. 400, 401.)

9. When Arthur got his top lease of December 22 from Keck, he went to talk to Miss Mesker, to get her lease; he showed her such lease signed by Keck and said to her:

> "I told her this is a lease on Keck, and then I asked her to sign; she wanted a lease like Keck and I gave it to her." (R. 126.)

After Oeth had shown Miss Mesker the top lease signed by Keck to Oeth in his own name, she consented to sign a similar lease with him and arranged to meet him at her lawyer's office for that purpose at eleven o'clock the next day. (R. 127.).

10. Additional time for the drilling of the first well as provided for in the Muth-Oeth lease was granted in the top lease for a period of sixty or ninety days for the reason that Oeth "couldn't get Keck's copy of his lease and show Mesker because it was running out shortly, and I

(Arthur Oeth) was trying to get some time on the Mesker lease and on the Klucker lease." (R. 147.)

11. Just a short time before March 22, 1948, Keck told Muth he had given Arthur Oeth a top lease on his land; he thought it was a good lease; he did not tell Muth that the time for drilling a test well had been extended thirty or sixty days by such top lease, and Muth had no knowledge of such extension of time. (R. 98, 99, 390.) Arthur Oeth destroyed this top lease (Finding 13, R. 465); he tore it up on the morning of March 23, 1948. (R. 147.)

12. During the month of March, 1948, wells for oil and gas were being drilled in the same general vicinity as the Keck lands, principally by the defendant, The Johnston Drilling Company, and such wells proved productive of oil in paying quantities at depths in exess of 2300 feet and up to 2550 feet. (Finding 10, R. 464.)

13. The plaintiff requested the defendant, Arthur Oeth, to move his small Star rig onto the Keck property and commence drilling a well; the defendants Oeth refused to move any rig which they owned onto the Keck farm for the purpose of drilling and the defendant, Arthur Oeth, declined to attempt the drilling of such well with said Star rig and so informed plaintiff in the latter part of February, 1948. (Finding 11, R. 464.)

14. The fraudulent scheme thus put in motion by Keck and Arthur Oeth began to expand. At that time Oeths and Muth were trying to wind up their partnership affairs, which included disposition of the Keck lease. (Plaintiff's Exhibit B-1, R. 438.) About one week before March 22, 1948, Muth learned that Keck had given Arthur Oeth a top lease and he went to see Keck and tried to get a copy of it. Keck told him he had given Oeth the top lease, but Oeth didn't leave him any lease or any copy. (R. 316.) Muth had some arrangements made for financing the well, but

they did not materialize after it was found out that Arthur would probably cause trouble with the lease. (R. 317.)

15. The Court found that Muth talked with two men at Mt. Vernon, Indiana, and one man at Mt. Carmel, Illinois, about purchasing his interest in the Keck lease of December 22, 1947, and the defendant, Arthur Oeth, told them he had a top lease on the Keck property. This was all prior to March 22, 1948. (Finding 15, R. 466) This finding was based upon the uncontradicted evidence of Joel Vale and Edward Turner that in the early part of March, 1948, Mr. Muth had talked to them about doing some drilling under the Keck lease of Muth and Oeth, and Mr. Muth wanted to sell his interest in such lease to them; they went and talked to Arthur Oeth in regard to whether they should buy it, and he told them they shouldn't buy it; it would just be a short time and it would be out, and he told them he and his son had a top lease over, a top lease on them (R. 153); when they told Oeth that Muth wanted to sell out completely, Mr. Oeth discouraged them from buying, and said the lease would be out in a short time, "that they had an override on this and it would be theirs in about a week". (R. 154.) Mr. Muth told Vale and Turner that he and Oeth couldn't get along, they had a falling out, and if they couldn't buy Mr. Oeth, he, Muth, wanted to sell to them; he wanted to sell his part if Mr. Oeth wouldn't sell; they asked Oeth about purchasing an interest and Arthur Oeth said "That the lease which Muth had taken on the Keck farm would expire in a short time, and he had a top lease". (R. 162, 163.) At that time Vale and Turner were financially able and willing to drill on the Keck land if they could have made arrangements with Muth and Oeth. (R. 164.)

16. After Arthur Oeth got the top lease from Keck, sometime between the 10th and 15th of March, he talked with Keck about the lease over at the well on the Nurren-

burn land (R. 127); he also saw the defendant Ollie Husk occasionally around the Nurrenburn well and talked with him (R. 127); Husk knew of the partnership lease of Muth and Oeth from Keck and he had gone to the record to see it right after he had seen Mr. Keck about getting the lease for The Johnston Drilling Co. (R. 262); Keck had promised Husk he would give him the lease after the Muth-Oeth lease had expired. (R. 262.)

17. On the 20th or 21st day of March, 1948, plaintiff's drilling contractor, defendant James A. Boland, employed a certified engineer to have a survey made of the Keck premises and to certify the survey showing the location of the test well and other data and furnish plats thereof and data for a drilling permit and to furnish bond as the law required. Said drilling contractor hauled timbers for leveling the drilling rig and bricks for boiler and other equipment for commencing the drilling of a test well on a farm adjoining the Keck farm. Boland and his son took the Keystone No. 5½ drilling rig to the premises of Keck and into the barn lot thereof, a distance of some 700 feet from the location referred to as "No. 1 Relocation", on the evening of the 22nd day of March, 1948, around the hour of seven o'clock P. M., and said drilling rig was left there in the barn lot until the morning of the 23d day of March, 1948. The defendant Ollie Husk visited the Keck farm once during the day of March 22nd and in the evening of said day had a telephone conversation with defendant Keck in which he informed Keck that actual drilling had to begin under the joint lease before midnight of said day to validate the lease. (Finding 18, R. 466, 467.)

18. The ground was soft because of heavy rains, and when the plaintiff and Boland arrived at the Keck farm on the morning of March 23d, 1948, they found the drilling rig had settled on one side and required jacking up and extricating before being moved to the No. 1 Relocation.

During the progress of this work, defendants Arthur Oeth and Robert Oeth came to the Keck home and soon thereafter defendant Ollie Husk arrived, and the defendants Arthur Oeth, Robert Oeth, Fred J. Keck and defendant Ollie Husk, were all there together, but none of them talked to Muth or his driller and there was no discussion at that time about their not having drilled or not being able to get their drill to the drilling site (R. 392, 393) until after dinner when, according to Keck's testimony (R. 383, 394), Muth and Boland had moved their rig further and he said it was headed right straight for his brooder-house, and it was no use for him to tell them to stop because they wouldn't do it, and Mr. Husk then said to Keck, "You can stop them by having a legal notice served on them" (R. 394), and Keck replied "That would be a good way to get myself into a law suit" and he (Husk) said he didn't think so, "We will be back of you" (R. 396); thereupon Oeth, Keck and Husk left the Keck farm in Husk's automobile and proceeded to the city of Evansville to the law office of Joe Vol Butt, who prepared for them a written notice dated March 23, 1948, directed to James A. Boland and Mr. John J. Muth, Sr., advising them that they were then trespassing without right upon the Keck property, demanded that they leave such property, and notified them that they would be held responsible for damages for all their acts in trespassing or in continuing to trespass on the Keck land. (Plaintiff's Exhibit K, R. 448.) Husk took Keck to the attorney to get Muth and Boland stopped so he could put himself in a position to get the lease (R. 148); this notice was signed by Keck and on the afternoon of March 23 the defendants Oeth and Husk returned with defendant Keck to the Keck farm whereupon Keck gave one copy of said notice to Boland and read the notice and gave a copy thereof to the plaintiff Muth. Before defendant Keck served said notice, the defendants Arthur

Oeth, and Husk, acting as agent for The Johnston Drilling Co., agreed with the defendant Keck that they would defend any law suit that might be instituted against him by reason of any prior leases for oil and gas on said premises, and with particular reference to the lease of December 22, 1947, to plaintiff Muth and the defendants Arthur Oeth and Robert Oeth. (Finding 19, R. 467, 468, 469.)

19. On the 27th day of March, 1948, the defendant Husk obtained from Kecks an oil and gas lease for The Johnston Drilling Co., Inc., on the same 67.5 acres of defendant Keck (Finding 21, R. 470), and The Johnston Drilling Co., Inc., by the defendant Ollie Husk, and Arthur Oeth, signed the indemnifying agreement, which lease and agreement were prepared by said attorney.

20. On June 2, 1948, defendant Aetna Oil Company took an assignment of a one-half interest in and to said lease of The Johnston Drilling Co., Inc., subject to an overriding royalty of one-sixteenth of seven-eighths interest to an unnamed party, later disclosed to be defendant Husk. (Finding 22, R. 471.) Such assignment was not recorded until July 27, 1948. (Finding 23, R. 472.)

21. Prior to the execution of the assignment of an undivided one-half interest in and to their lease herein by The Johnston Drilling Co., Inc., to the Aetna Oil Company, Attorney Joe Vol Butt was employed by the defendant, the Aetna Oil Company, to examine and pass on the title to said leasehold for the said Aetna Oil Company. Said attorney was employed by The Johnston Drilling Co., Inc., on March 27, 1948, to pass on the title to said leasehold interest for it. By reason of having represented all of the defendants to the present suit (except Boland) in some capacity in connection with the matter of the lease for gas and oil on the 67.5 acres of defendant, Keck, said attorney for the various parties was fully aware and

apprised of all the matters and things connected with said title and said litigation and the knowledge of such attorney is imputed to the defendants, The Johnston Drilling Co., Inc., and Aetna Oil Company, and was the knowledge of said companies at the time they acquired their respective interests in the premises. (Finding 24, R. 472.)

22. The first two wells which were drilled on the Keck land by The Johnston Drilling Co., Inc., under its lease of March 27, 1948, were drilled at the locations which had been selected by Muth's surveyor for him, and for which Muth had paid such surveyor $85.00, and such payment included the making of an application by such surveyor for the bond and permit. (R. 373-376; Plaintiff's Exhibit Z, R. 457.)

23. To the first day of November, 1949, the wells on the Keck lease had produced 45,406.57 barrels of oil and the total revenue derived therefrom was $125,776.18. (Plaintiff's Exhibit V, R. 454.) At the time the action was instituted the Keck lease of December 22, 1947, given to Oeths and Muth was worth a quarter of a million dollars; it would have sold for that. (R. 348.)

24. The special findings of fact and conclusions of the master were filed on March 2, 1950 (R. 460); on March 11, 1950 the plaintiff filed written objections to certain findings of fact and to the conclusions of law of the special master (R. 476, 491); the special findings of fact and conclusions of law of the court were filed on July 17, 1950 (R. 492, 493); on July 26, 1950, plaintiff filed his written motion for judgment in his favor and moved the court to direct the entry of an appropriate judgment for the plaintiff against the defendants (R. 494, 499); on August 3, 1950 the defendants filed their motion to strike the motion by plaintiff for judgment in his favor (R. 499, 500); such motion to strike was sustained on August 7, 1950 and thereupon it was considered, ordered, adjudged and decreed that

plaintiff take nothing by his complaint; that judgment be entered against the plaintiff and for the defendants, except Boland, and that defendants recover their costs (R. 501); notice of appeal was filed on September 2, 1950 (R. 502), together with appeal bond and plaintiff's statement of points. (R. 503, 507.)

II.

OPINION BELOW.

There was no written opinion of the district court. The special findings of fact and conclusions of law of the master are on pages 460 to 476 of the Record; the court's findings of fact and conclusions of law are on pages 492 and 493 of the Record.

The opinion of the Court of Appeals for the Seventh Circuit is not reported, but is in the Record on pages 519 to 530.

III.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the court of appeals was entered on May 8, 1951. (R. 530.) No petition for a rehearing was filed. On May 21, 1951, its mandate was stayed pursuant to its Rule 25. (R. 531.)

The jurisdiction of this court is invoked under Title 28 United States Code, Section 1254 (1).

This petition is presented in a civil case by the plaintiff who was and is a party thereto.

IV.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28 United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Burns Indiana Revised Statutes, 1933 (1951 Repl.), Section 50-430:

> "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Burns Indiana Revised Statutes, 1933 (1951 Repl.), Section 50-421:

> "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the * * * conduct, or liquidation of the partnership or from any use by him of its property."

QUESTIONS PRESENTED.

The decision of the United States Court of Appeals for the Seventh Circuit is in conflict with important decisions of the Supreme Court of Indiana governing oil and gas leases in said state and is in conflict with certain other decisions of the Supreme Court of Indiana on important questions of local law, including statute law, of the State. The decision is also in conflict with certain decisions of other United States Circuit Courts of Appeal on the same matters.

The questions in point arising on the decision are:

First. Did the partnership between plaintiff Muth and defendants Arthur Oeth and Robert Oeth to obtain oil and gas leases and to drill for gas and oil terminate as to the lease for gas and oil in suit on the giving of notice by Arthur Oeth to cancel the partnership agreement and acceptance of the same by plaintiff and before performance or disposition of the oil and gas leases of the partnership including the joint lease of the partners with lessor, defendant Keck, here in suit.

Second. Did the execution by lessor Keck of an oil and gas lease to defendant Arthur Oeth, one of the partners in the joint lease, while the partnership lease was in full force and effect, giving such partner the entire interest in the leasehold instead of the one-fourth interest he had under the partnership lease, and giving such individual partner thirty to sixty days additional time in which to drill a test well for gas and oil on the premises with the express consent of lessor Keck to exhibit the same to third persons as a valid outstanding lease constitute an obstruction or interference on the part of the lessor with the performance of the covenants of the partnership lease on the

same premises and whether giving partner Arthur Oeth all the leasehold in which as partner and co-tenant he had only a one-fourth interest if he performed the same was not such an inducement as to lead the favored partner to hold the drilling rigs of the partnership off the premises until the time limit for drilling a test well under the partnership lease should expire, thereupon he would claim the entire leasehold under the top lease he still retained.

Third. Whether the decision holding valid and proper the contract of the defaulting partner Arthur Oeth to defend the lessor Keck against any lawsuits growing out of the joint lease or the top lease, causing the eviction of his partner Muth from the premises and refusing to let Muth perform the drilling covenants of the partnership lease, and thereafter joining with the defendant Johnston Drilling Company, Inc., in such indemnity agreement to induce the lessor Keck to execute the third lease for gas and oil to defendant Johnston Drilling Company, Inc., and thereby depriving his own partner and co-tenant of the most valuable asset of the partnership—the Keck lease—is in conflict with important decisions of local law as well as applicable decisions on the same question of other United States Courts of Appeal.

Fourth. Whether the holding in the opinion that mere refraining from interfering in the performance of the covenants of an oil and gas lease by one partner and co-tenant constitutes the "good faith" required of either a partner or co-tenant may be an erroneous declaration of law applicable to a rapidly growing industry in Indiana, and in direct conflict with the law governing such relation in Indiana as well as applicable Federal decisions.

Fifth. Whether in the interpretation of the time clause for drilling in an oil and gas lease the words "null and void" are self-executing or require an election by the lessor to terminate the lease, and whether such lessor him-

self must be without fault and not wrongfully or improperly influenced, as held by ruling precedents in the law governing such clauses in Indiana oil and gas leases, as well as of the United States Supreme Court.

Sixth. Whether any contracting party who executes an instrument that is both a conveyance and a contract as was the joint lease of defendant Keck of December 22, 1947, to plaintiff John J. Muth, one-half interest and to defendants Arthur Oeth and Robert Oeth, one-half interest, who thereafter grants one such partner and co-tenant thirty to sixty days additional time in which to commence the drilling of a test well for gas and oil, definitely and certainly, as a matter of law, grants such extension of time in which to perform the drilling covenants of the joint lease of the partnership, or in such event, irrevocably waives the provisions of the three months clause in the partnership lease.

Seventh. Did the grant of the top lease by Kecks to Arthur Oeth in his name alone, which extended the time for the drilling of a test well thirty to sixty days beyond March 22, 1948, and the use which Arthur Oeth made of the knowledge and interest which he acquired through such top lease to prevent Muth from accomplishing the purpose of his partnership relation with Oeth as to the joint lease of December 22, 1947, charge the property described in such top lease with a constructive trust for the benefit of Muth which may be enforced by him in this litigation?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

One.

The decision that the fiduciary relation existing between Appellant Muth and Appellees Arthur Oeth and Robert Oeth terminated upon the dissolution of the partnership is in conflict with the law of Indiana declared in the case of *McKinley* v. *Long* (1949), 227 Ind. 639, 88 N. E. (2) 382, and is further in conflict with the statutory law governing partnerships in the State of Indiana, providing that:

> "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."
>
> Burns Indiana Revised Statutes, 1933 (1951 Repl.) Section 50-430.

The decision is further in conflict with the provisions of Section 50-421, Burns Indiana Revised Statutes, 1933 (1951 Repl.), in that the statute provides as the law of Indiana that

> "every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the * * * conduct, or liquidation of the partnership or from any use by him of its property."

Two.

The decision that lessor, defendant Fred J. Keck, rightfully invoked the time limit for commencing the drilling of a test well for gas and oil on the leased premises is

in conflict with the decisions of the Indiana Supreme Court cited and followed in *New American Oil and Gas Company* v. *Troyer* (1906), 166 Ind. 402, 407-408, requiring the granting of a reasonable extension of time to perform the drilling clause of an oil and gas lease where the performance has been hindered or the delay has been reasonably induced by lessor's conduct. When lessor, defendant Fred J. Keck, top leased the entire partnership leasehold to one partner, defendant Arthur Oeth, at a time when such partner owned a one-fourth interest only in the joint or partnership lease for gas and oil, he thereby induced said partner of plaintiff Muth to withhold the use of partnership drilling rigs for spudding in a well for gas and oil until the period of three months for beginning a test well should elapse and then the top lease would take all the gas and oil rights with thirty to sixty days additional time in which to begin the test well, lessor, defendant Fred J. Keck, thereby prevented and blocked the performance of the drilling clause in the partnership lease and became estopped to invoke such time limit against the one partner, plaintiff John J. Muth, who was striving to perform the same. The decision of the Court of Appeals in this case is likewise in conflict with the decision upon this question by the Court of Appeals for the First Circuit in *Fred W. Mears Heel Co., Inc.* v. *Walley* (.....) 71 Fed. (2) 876, which affirmed the decision below reported in 4 Fed. Supp. 277, where the court held that a clause in a contract making it void for failure to perform a condition, is subject to the legal requirement that the party seeking to avail himself of the non-performance must not himself be in default.

Three.

The decision approving the right of lessor, Defendant Fred J. Keck, to deny he intended to vest lessee, defend-

ant Arthur Oeth, with title to the leasehold by executing the top lease or extend the time for thirty to sixty days to drill a test well for oil and gas on the leased premises is in conflict with the decision of the Supreme Court of Indiana in the case of *Preston* v. *Witherspoon* (1886) 109 Ind. 457, 464-465, quoting *Cowdrey* v. *Vandenburgh,* 101 U. S. 572, and holding that whether the party executing a conveyance intended vesting the grantee therein with title or not, he is estopped to deny such intent if there be negligence in respect to the duty owing the party injured thereby.

Four.

Lessor, defendant Fred J. Keck, knew of the partnership when he executed the joint lease of December 22, 1947, to the partners. He knew it remained unsettled as to their joint lease on his lands when he granted the second or top lease of the entire leasehold to the one partner in the Joint lease, defendant Arthur Oeth. He knew this indicia of title would be exhibited as valid to third persons and authorized it, and was bound to its legal effect when claimed as valid by the lessee, defendant Oeth, to prospective investors with plaintiff Muth, and the decision approving lessor Keck ordering plaintiff Muth off the premises as of midnight, March 22, 1948, is in conflict with the decisions in *Consumers Gas Trust Company* v. *Ink* (1904), 163 Ind. 174, 176, *Consumers Gas Trust Company* v. *Littler* (1904) 162 Ind. 320, 327-329, holding that a lessor in an oil and gas lease will not be permitted to cause the lessee to suffer from an act which the lessor himself induced. In this case inducing defendant Oeth by granting him the whole lease, instead of holding him to performance with plaintiff Muth of the joint lease and granting plaintiff's said partner and co-tenant Oeth thirty to sixty days additional time in which to commence drilling a test well for gas and oil

on the lease premises. The decision holding the lease null and void at the end of the three months is in conflict with the decision of the Supreme Court of the United States in *Steward* v. *Griffith,* 217 U. S. 323, reciting that the word "void" as used in conditions of this character is not self-executing and is to be considered as voidable to be insisted upon or waived at the lessor's choice.

Five.

In approving the acts of defendant Arthur Oeth in breaking his contract of partnership to keep the drilling rigs employed in exploring for gas and oil and joining with third parties—defendants Ollie Husk and Johnston Drilling Company, Inc.,—to induce the lessor in the joint lease and in the top lease, defendant Fred J. Keck, to oust his partner and co-tenant in the joint lease therein, from the premises, the decision is in conflict with the decision of the Supreme Court of Indiana in *Stevens, et al.* v. *Reynolds* (1895) 467, 477, holding the relation of co-tenant is one of trust and confidence and neither can do any act to prejudice or injuriously affect their interest in the common property, and abrogates the Indiana rule holding co-tenants as trustees in dealing with the joint estate. *McPheeters* v. *Wright,* (1890) 124 Ind. 560; *Ryason* v. *Dunten* (1904) 164 Ind. 85.

This decision is further in conflict with the decision of the Supreme Court of the United States in *Denver* v. *Roane* (1879) 99 U. S. 355, 358, 25 Law Ed. 476, holding that where partners had jointly undertaken the business intrusted to the partnership, all of the parties were under obligation to conduct it to the end as a duty owed to their client and to one another.

Six.

The decision and holding of the court that the lessor, defendant Fred J. Keck, after executing a lease for gas and oil on December 22, 1947, to plaintiff Muth one-half and to defendants Arthur Oeth and Robert Oeth one-half, with full knowledge the lessees were partners to take leases and drill for gas and oil, and thereafter, in the latter part of February or first part of March, 1948, executing a second lease for gas and oil on the same premises to one of the partners, defendant Arthur Oeth, granting him the entire leasehold and extending the time for drilling a test well from thirty to sixty days longer than in the joint lease, and permitting said Oeth to represent said top lease to be a valid and subsisting lease for whatever purpose, had the right to hold petitioner to strict performance of the three months drilling clause of the partnership lease, is in conflict with the law of Indiana governing performance of conditions subsequent as declared in *Elkhart Carworks Co.* v. *Ellis* (1887), 113 Ind. 215, holding:

> "It would be a flagrant violation of a right to permit the grantee of an estate upon a condition subsequent to defeat the action by wrongfully preventing the performance of the condition, and the law is not subject to the reproach of permitting such a thing to be done."

Seven.

The Court's opinion that the lessor in an oil and gas lease may rightfully require and receive the indemnity agreement of one partner and co-tenant in a joint lease to oust from possession of the leasehold premises the other partner and co-tenant seeking to perform the drilling covenant, and to give the partnership assets to a third party upon the absolute refusal of such indemnifying partner to himself perform it, and after lessor had granted to

such indemnifying partner and co-tenant a top lease to the entire leasehold in violation of the joint lease, and of his duty to the ousted partner, is the approval of an illegal agreement, void as against public policy and made in violation of the trust relation existing between the partners and co-tenants in the joint lease and conflicts with the decisions of other Circuit Courts of Appeal as in *Horbach* v. *Coyle,* C. C. A. (1924) 2 Fed. (2) 702, 706-707; *Trice* v. *Comstock,* C. C. A. 8 (1903), 121 Fed. (2) 620, and of the Supreme Court of the United States in *Buffum* v. *Peter Barceloux Company* (.....), 289 U. S. 227, 237, 77 Law Ed. 1140.

The case of *Trice* v. *Comstock,* C. C. A. 8 (1903), 121 Fed. (2) 620, is cited in the Indiana decisions in the case of *Washington Theatre Co., et al.* v. *Marion Theatre Corporation* (1948), 119 Ind. App. 114, 81 N. E. (2) 688, 692-693, to sustain the decision holding:

> "There is a broad rule of equity grounded upon the high duty of a trustee or fiduciary to his beneficiary or correlate which does not permit him to acquire an interest in the subject matter of the trust to the prejudice and detriment of his beneficiary or correlate. A person acting in a fiduciary capacity including an agent, corporate officer, or director, who secretly acquires in his own name, a succeeding or renewal lease on premises which his principal or his corporation is then occupying as lessee, in equity, holds such new lease for the benefit of his principal or his corporation. Under such circumstances, and especially where, as in the case at bar, the facts of such agency and fiduciary relationship are at all times known to the lessor, a court of equity will clearly declare a constructive trust in the lease for the benefit of the principal or corporation and may require an assignment of such lease to the principal or corporation. 32 American Jurisprudence, Section 991, p. 834; Restatement of Law of Restitution."

The point to which the *Trice* v. *Comstock* case (1903) C. C. A. 8, 121 Fed. (2d) 620, is cited is as follows:

> "This rule applies whether the lessor would or would not have renewed a new lease to the principal or corporation, and regardless of whether such principal or corporation had any legal or equitable interest in the lease or property which the agent so acquires in his own name. A general statement of such rule has been referred to as an 'inexorable principle' of the law, and one which is based upon 'that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law.' "

In its statement of plaintiff's case on page 524 of the record, the court of appeals says that

> "Plaintiff's case must rest on the premise that he was never legally divested of his interest in the Keck land, and the premise must be supported by one of two theories, (1) that plaintiff performed prior to midnight March 22, 1948, under the three-month provision of the joint lease, or (2) that by reason of the so-called 'top lease' given by Keck to Arthur Oeth early in March 1948, the time for performance under the joint lease was extended to the same extent as that provided in the top lease."

But plaintiff also seeks entirely different relief; he insists that he is entitled to the establishment of a trust in his favor against Keck's land, and an accounting for all oil that has been removed therefrom since March 22, 1948; he asserts that the evidence shows, without any contradiction or dispute, that when Arthur Oeth received from Kecks the top lease early in March, 1948, Oeth and his son Robert, and Muth, had an undisposed of partnership asset consisting of the joint lease which had been granted to them on December 22, 1947, by Keck and his wife, or

identically the same land which was described in and leased to Arthur Oeth in the top lease; the partners then had a written agreement as to how they would dispose of that asset if they could secure any one who would make an offer therefor that was satisfactory to either partner (Plaintiff's Exhibit B-2, R. 440); that a fiduciary relation existed between the partners as to such asset when the top lease was made; that in violation of such partnership fiduciary relationship, and in violation of Keck's relation to Muth as his landlord, he having knowledge of the partnership agreement, Keck wrongfully gave to Arthur Oeth alone a top lease on the land covered by the partnership lease, gave him an additional thirty or sixty days in which to drill the test well, and thereupon, Arthur Oeth wrongfully used the knowledge and the interest which he thus acquired by such top lease in fraudulently preventing his correlate Muth from accomplishing the object of his said partnership, and a constructive trust was therefore impressed upon the property referred to in such leases in favor of Muth.

Eight.

(A) In denying plaintiff's rights and status as a partner and co-tenant under the laws of Indiana with especial reference to the oil and gas lease in suit, and

(B) In failing to require the exercise of good faith from lessor, Keck, in dealing with the leasehold as established by the law of Indiana, and

(C) In declaring the invalidity of the top lease on the Keck property instead of weighing its evil effect in inducing defendant Oeth to withhold the partnership drilling rigs from the premises as well as using it to frighten away prospective investors with plaintiff Muth in either buying his interest or financing the drilling for gas and oil and

(D) In approving the illegal agreement of plaintiff's partner with a third party the Johnston Drilling Company, Inc., to induce lessor Muth to declare the partnership lease terminated and giving it to said third party, and

(E) In failing to declare a constructive trust in the premises by reason and because of Oeth's deal for the top lease on the same premises with lessor Keck, and using the said top lease to defeat his partner Muth in performing the prior joint lease and using his top lease to prevent any investment with Muth in the lease, and joining with third parties to obtain from Keck the eviction of his partner Muth from the premises and obtaining for the Johnston Drilling Company, Inc., the leasehold itself,

Plaintiff is by the decision denied the equal protection of the law, and the applicability of cardinal principles of trust law, heretofore declared to be inexorable, denied to the important relationship of partners and co-tenants in oil and gas leases in this jurisdiction.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 10279, John J. Muth, Plaintiff-Appellant *vs.* Aetna Oil Company, Johnston Drilling Company, Inc., Fred J. Keck, Ida F. Keck, Robert Oeth, Arthur Oeth, James A. Boland and Ollie Husk, Defendants-Appellees, all to the end that this cause may be reviewed and determined by the Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Seventh Circuit be reversed by the Court

and for such further relief as to this Court may seem proper.

Dated June 23, 1951.

JOHN J. MUTH,
Petitioner,

By: WILLIAM C. WELBORN,
ALBERT WARD,
Counsel for Petitioner.

MILFORD M. MILLER,
PALMER K. WARD,
Of Counsel.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 147

JOHN J. MUTH,
Petitioner-Appellant Below,
vs.

AETNA OIL CO., JOHNSTON DRILLING CO., INC., FRED J. KECK, IDA F. KECK, ARTHUR OETH, ROBERT OETH, JAMES A. BOLAND, OLLIE HUSK,
Respondents-Appellees Below.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

JOE VOL BUTT,
401 Old National Bank Building,
Evansville, Indiana,
BERT C. CHEATHAM,
322 Court Building,
Evansville, Indiana,
CURTIS C. PLOPPER,
205 Court Building,
Evansville, Indiana,
DE ROO WEBER,
1 Fourth & Main Building,
Mt. Vernon, Indiana,
JOE S. HATFIELD,
CHARLES H. SPARRENBERGER,
705 Hulman Building,
Evansville, Indiana,
Attorneys for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Petitioner has properly set out the disposition of this cause in the trial court and in the United States Court of Appeals for the Seventh Circuit. The agreement of October 6, 1947, between the defendants, Oeth, and Plaintiff, Muth, is substantially as summarized by petitioner; but the terms of such agreement were known only to the parties to it. and defendants Johnston Drilling Company, Inc., Aetna Oil Company, and Ollie Husk had neither actual nor constructive knowledge of such agreement (R. pp. 341-342; Finding 25, R. p. 473). Such agreement was not recorded, and said defendants had no knowledge of the former partnership relation existing between the Oeths and Muth (R. pp. 341-342).

After Arthur Oeth, on January 3, 1948, gave notice to Muth of his intention to terminate the partnership relation, after thirty (30) days, pursuant to the agreement, the lease from Keck of December 22, 1947, remained an asset acquired during the existence of the partnership. But such lease would terminate, according to its own terms, unless the drilling of a test well was commenced within three (3) months (or by March 22, 1948) (R. p. 35; Finding 4, R. p. 462).

Muth and Arthur Oeth made separate attempts to get a well drilled on the Keck lease by March 22, 1948 (R. pp. 117-119, 122; R. p. 360). In order to accomplish this, Arthur Oeth, sometimes with Muth in company, attempted to obtain adjoining leases in order to assemble a drilling block. In this they exhibited the Keck lease as an inducement to neighboring owners and as an example of the type of lease used (R. p. 339; Finding 9, R. p. 463; Finding 11, R. p. 464). But Muth had the Keck lease in his possession (R. p. 339; Finding 9, R. p. 493) and in the attempt to obtain a lease on the Mesker tract and Klucker tract, adjoining the Keck land, the neighbors had demanded to see what type of lease Keck had executed (R. p. 118; Finding 12, R. p. 464). The

so-called "top lease" was actually an "exhibit lease" prepared from memory on substantially the same form as the original Keck lease, to exhibit as a lease "similar to Kecks" (R. p. 126). It was not acknowledged, nor paid for, nor recorded, nor treated by Oeth or Keck as a subsisting lease (R. p. 390; Finding 12, R. p. 465). Keck himself informed Plaintiff of such exhibit lease, but explained that it did not impinge upon the lease of December 22, 1947, and that Plaintiff's lease was still good provided timely performance was effected (R. p. 390; Finding 12, 13 and 14, R. p. 465). Such exhibit lease was used only in an attempt to gain additional leasehold acreage to induce development and preserve the lease of December 22, 1947, for Plaintiff as well as the Oeths (Finding 12, R. p. 465).

With reference to the statement in Numerical Paragraph 14 of the petition that plaintiff requested defendant, Arthur Oeth, to move a small Star rig on the Keck property and commence and that defendant Oeth refused so to do: Oeth refused so to do for the reason that neither Muth nor defendants had the money with which to start the drilling of a well and the Star rig was of insufficient capacity to drill a well to depths in excess of 2,300 feet required to reach the oil producing formation in that vicinity (Finding 10-11, R. p. 464).

Beginning with the first sentence of Numerical Paragraph 14 in Petitioner's summary, the summary itself is largely devoted to argument.

The engineer employed by Plaintiff, through Boland, surveyed a location in the northeast ten acres of the Keck land on March 22, 1948 (R. p. 372). Boland complained that the location was too rough, and requested a location at a different point (R. p. 372). The relocation was not made till March 23, 1948 (R. pp. 370, 392). The engineer was not requested to apply for a bond or a drilling permit for plaintiff (R. p. 371), and it was not his custom to do so unless

specifically instructed so to do (R. p. 373). Boland brought the cable rig to the barnlot at the Keck farm about dusk on the evening of March 22, 1948, left the rig against the barn, talked with no one, and left within ten or fifteen minutes (R. pp. 392-393). Such rig did not have the needed equipment to drill or to commence drilling; the rig lacked a rope socket, boiler, wrenches, hand tools, a drill stem, a drilling bit, and a set of jars, and had insufficient drilling cable (R. pp. 194-196, 210-211). By the admission of plaintiff's own drilling contractor, such rig was not moved to the drilling location, did not commence the drilling of a well, and was not even equipped to commence drilling within the time required by the lease itself (R. p. 217). Plaintiff did not file the necessary bond with the Conservation Department, nor obtained any drilling permit (Finding 18, R. p. 467).

Keck did not interfere with the commencement of drilling or prevent performance by plaintiff (R. pp. 209-210; Finding 26, R. p. 473). Keck's son even assisted plaintiff in staking a location by pointing out property lines (R. pp. 204-209). When plaintiff's contractor complained that he would have difficulty reaching the location, Keck offered his assistance in showing a better means of access (R. p. 391). Keck's sole aim in executing the lease of December 22, 1947, and the lease of March 27, 1948, was to gain development, and the royalties provided in each lease, for him were the same (Finding 26, R. p. 473). No indemnity, verbal or written, was given to Keck at any time prior to March 23, 1948, and Keck did not notify plaintiff to quit his premises until March 23, 1948.

Paragraph No. 22 on page 13 of the petition for writ of certiorari contains an erroneous statement concerning the fee paid by Muth for surveying "and such payment included the making of an application by such surveyor for the bond and permit." This statement is in error. The charge of the surveyor was made for surveying two loca-

tions and furnishing one plat and six prints, and did not include the cost of bond or permit (R. p. 374). The surveyor was not ever requested to apply for a bond or drilling permit for plaintiff, nor did Plaintiff pay for same (R. p. 371).

OPINION BELOW.

The opinion of the Court of Appeals is now reported at 188 Federal 2d 844.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE PETITION FOR THE WRIT.

Petitioner sets out eight alleged reasons for granting the writ, each of which will be discussed briefly below.

One.

Petitioner's first reason relies upon petitioner's interpretation of an Indiana Statute (Burns Indiana Revised Statutes, 1933, Section 50-430). An interpretation of this statute was not presented either to the District Court or to the Court of Appeals and petitioner now urges this statute for the first time. The Supreme Court will not consider, upon certiorari, any question not raised in the lower courts. *Saltonstall* v. *Birtwell* (1896), 164 U. S. 54; 17 S. Ct. 19; 41 L. Ed. 348. *Burnett* v. *Commonwealth Co.* (1932), 287 U. S. 415; 53 S. Ct. 198; 77 L. Ed. 399. *Helvering* v. *Minnesota Tea Co.* (1935), 296 U. S. 378; 56 S. Ct. 269; 80 L. Ed. 284.

Two.

The second reason relied upon by petitioner for allowance of the writ is the claim that the decision of the Court of Appeals is in conflict with a decision of the Indiana Supreme Court in *New American Oil and Gas Company* v. *Troyer* (1906), 166 Ind. 402, 407-408; and is in conflict with

a decision of the Court of Appeals of the First Circuit in *Fred W. Mears Heel Co., Inc.* v. *Walley* (.....), 71 Fed. (2) 876.

Each of the above cases is readily distinguishable from the instant case. The Indiana case involved an oil and gas lease which could be extended for successive periods of three months each by the payment of a cash rental. The lessee paid a cash rental for a period of three months from March 6, and on the following March 20 the lessor commenced his action to cancel the lease and quiet his title. Since a rental had been paid for a period extending for almost three months after the lessor sought to cancel the lease it was held, quite naturally, that the lease could not be canceled during a period for which rental had already been paid. The facts distinguish the case.

The decision from the First Circuit, relied upon by respondent as contrary to the decision of the Court of Appeals in this case, also involved an entirely different set of facts. The *Fred W. Mears* case simply holds that the party acting to avail himself of the non-performance on his own must not himself be in default of performance on his own part. In the instant case no act of performance was required by Keck. He granted a lease to plaintiff and defendants Oeth subject to the provisions that the same should terminate unless the lessees commenced drilling by March 22, 1948. Plaintiff did not lose his rights under the lease due to any act or interference by Keck; plaintiff lost his lease by failure to comply with its provisions.

Three.

The third reason relied upon by plaintiff is the alleged conflict between the decision of the Court of Appeals in this case and the decision of the Supreme Court of Indiana in *Preston* v. *Witherspoon* (1886), 109 Ind. 457. But, this

case simply states the doctrine that a bona fide purchaser will be protected against the claims of the true owner, where the true owner has placed apparent title in the person selling to the bona fide purchaser. The *Witherspoon* case is not in any way in conflict with the decision of the Court of Appeals in this case.

Four.

The fourth alleged reason for the writ urged by plaintiff is that the decision of the Court of Appeals in this case is in conflict with the decision of the Supreme Court of Indiana in *Consumers Gas Trust Company* v. *Ink* (1904), 163 Ind. 174. But, in that case the lessor attempted to work a forfeiture during a period for which a cash rental had already been paid and accepted by the lessor. Hence, in that case it was quite proper to say that the forfeiture was not self-executing, but that case, on its facts, is not in conflict with the decision of the Court of Appeals in this case.

Five.

The fifth reason urged by plaintiff for claiming the writ is that the decision of the Court of Appeals is said to be in conflict with a decision of the Supreme Court of Indiana in *Stevens, et al.* v. *Reynolds* (1895), 143 Ind. 467, and is in conflict with the decision of this Court in *Denver* v. *Roane* (1879), 99 U. S. 355, 358, 25 Law Ed. 476. The facts in those cases distinguish such cases from the instant case, for the evidence was, and the trial court found as a fact, that Oeth did nothing to hinder plaintiff toward drilling under the lease of December 22, 1947 (Finding 26; R. p. 473).

Six.

Defendants have no quarrel with the doctrine of *Elkhart Carworks Co.* v. *Ellis* (1887), 113 Ind. 215, cited as the sixth reason for granting the writ. Plaintiff entirely overlooks the evidence, and the finding of the trial court (Finding 26; R. p. 473) that neither Keck nor Husk hindered plaintiff and ignores finding (Finding 12; R. p. 464) that the "top lease" was in fact no more than an exhibit, that it was obtained by Oeth in an attempt to gain additional leasehold acreage and thereby preserve the rights of both plaintiff, and Oeth and that Keck did not, by such top lease, attempt to oust Muth (Finding 14; R. p. 465).

Seven.

The seventh reason urged by plaintiff refers to the so-called indemnity agreement. This argument entirely overlooks the fact that no indemnity, verbal or written, was suggested, offered, or accepted, until after March 22, 1948, the date by which plaintiff had to perform the provisions of the lease under which he claimed. Keck, as the fee owner of the land, and after the time for commencing drilling had expired under the lease of December 22, 1947, had the right to demand any indemnity he pleased after plaintiff had failed to commence drilling, and after plaintiff's lease had expired. That Keck demanded such assurances is not surprising in view of the threats of litigation made by Boland.

Eight.

The eighth reason urged by plaintiff is simply a summary of the former reasons, and states the evidence most favorable to him, rather than as found by the court.

SUMMARY.

The judgment of the District Court and the decision of the Court of Appeals were not in conflict with any established doctrine of either this Court or the Supreme Court of Indiana or a decision from another Circuit. The findings of fact find adequate support in the evidence. It seems to be the chief effort of plaintiff to review the evidence and to restate the findings by culling out those bits of evidence most favorable to plaintiff. But the evidence has already been heard by a Special Master, has been reviewed by the District Judge and has been subject to appellate review by the Court of Appeals for the Seventh Circuit. This Court will accept as correct such findings of fact as have been made by the District Court and in which the Court of Appeals has concurred, unless such findings are wholly without support in the record. *Coreyell* v. *Phipps* (1942), 317 U. S. 406; 63 S. Ct. 291. *Comstock* v. *Group of International Investors* (1948), 335 U. S. 211; 68 S. Ct. 1454; 92 L. Ed. 1911. Indeed, Certiorari is not granted for the purpose of reviewing the evidence and discussing specific facts. *U. S.* v. *Johnston* (1925), 268 U. S. 220; 45 S. Ct. 496; 69 L. Ed. 925.

The findings of fact being amply supported by the evidence, and the judgment of the court flowing logically from such findings, it is respectfully submitted that the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES H. SPARRENBERGER,
JOE VOL BUTT,
JOE S. HATFIELD,
CURTIS C. PLOPPER,
BERT C. CHEATHAM,
DE ROO WEBER,
Counsel for Respondents.